No. 47315-1

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAFAEL GUTTIEREZ MEZA,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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I. ISSUES

A. Did the State comply with the law when the State presented application, including a sworn affidavit of probable cause, to the Superior Court requesting an order freezing the bank account being used by Meza to launder the proceeds of his thefts, and the court issued an order requiring the bank to freeze activity on the account?

B. Should the appellate court address issues not specified in the ruling granting review?

II. STATEMENT OF THE CASE

On June 27, 2014, the State filed a motion to freeze Meza's credit union account alleging that Meza stole $75,000 from Mr. John Armstrong when he accepted payment for an asphalt plant that Meza had in fact, sold to another person almost six months earlier. CP 12. Meza compounded the crime by lying to Mr. Armstrong regarding the disassembly and transportation of the plant when arrangements with the shipper were never made. CP 12. Meza also appeared on the verge of fleeing the country with the proceeds. CP 12. These allegations were based upon the following facts:

In August of 2013, Cliff Mansfield obtained a purchase agreement from Rafael Meza in which Mr. Mansfield agreed to buy Meza's asphalt plant for $95,000. CP 9. Meza accepted payments from Mr. Mansfield by way of electronic fund transactions (EFTs) directed to Meza's credit union account. The payments included:

$15,000 on October 22, 2013; $40,000 on January 2, 2014; $40,000 on June 4, 2014; $5,000 on June 13, 2014; and $5,000 on June 18, 2014. CP 11.

Notwithstanding Meza's agreement with Mr. Mansfield, on March 30, 2014, Meza agreed to sell the same plant to John Armstrong for $75,000. CP 7. Meza accepted payments from Mr. Armstrong by way of one EFT deposit directed to Meza's credit union account on April 11, 2014, in the amount of $15,000; and one payment of the remaining amount in cash in person ($55,000). CP 7, 8, 11, and 12.

Between March 30, 2014, and June 14, 2014, Mr. Armstrong was in continual contact with Meza regarding the plant. CP 7-8. On June 14, 2014, (after Meza had accepted $100,000 in payments from Mr. Mansfield) Meza told Mr. Armstrong that the asphalt plant was loaded on the trucks and would soon be taken to Alaska Marine for transportation to Mr. Armstrong in Alaska. CP 7-8.

On June 18, 2014, Mr. Armstrong learned the plant was not delivered. CP 9. That same day, Meza delivered a bill of sale on behalf of Mr. Mansfield to the Alderbrook Quarry where the asphalt plant was being stored. CP 9.

Between October 26, 2013, and June 19, 2014, Meza withdrew approximately $89,000 in cash in over 41 transactions of $3,000 to $5,000 each. CP 11. Mr. Mansfield reported that Meza had plans to go to Mexico very soon. CP 10.

III. ARGUMENT

A. A COURT ORDER, BASED UPON A SWORN AFFIDAVIT OF PROBABLE CAUSE, ISSUED BY A NEUTRAL AND DETACHED SUPERIOR COURT JUDGE, ORDERING A CREDIT UNION MANAGER TO FREEZE AN ACCOUNT CONTAINING EVIDENCE AND FRUITS OF A CRIME, IS A WARRANT.

Meza claims that the order freezing his credit union account is not a warrant because the order did not cite CrR 2.3 and did not comply with certain procedural requirements of CrR 2.3. Furthermore, Meza asserts that the remedy for these errors is to vacate the order. The State responds that the order satisfies the constitutional requirements for a warrant; and because the identified procedural deficiencies did not prejudice Meza, the trial court's order freezing the funds should be upheld.

1. The Court Order Freezing Meza's Credit Union Account Is A Warrant.

Few cases in Washington define the term "warrant." But in *People v. Wood*, 71 N.Y. 376 (1877), the Court of Appeals of New York states:

> [W]hatever may be the definition of the word warrant given by lexicographers, a lawyer's idea of the thing is a writing from a competent authority in pursuance of law, directing the doing of an act, and addressed to an officer or person competent to do the act, and affording him protection from damage, if he does it.

The U.S. Constitution addresses what must be in a search and seizure warrant:

> [N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. An additional constitutional requirement is that the warrant must be issued by a detached and neutral magistrate with authority to issue such process. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Article I, section 7 of the Washington State Constitution requires authority of law. The term, "authority of law" is akin to the warrant requirement of the fourth amendment to the U.S. Constitution. *State v. Chenoweth*, 127 Wn. App. 444, 459, 111 P.3d 1217 (2005), *Aff'd*, 160 Wn.2d 454, 158 P.3d 595 (2007).

At the hearing on Meza's motion, the trial court specifically concluded that the order drew its authority from CrR 2.3. RP 25-26. The court also found this conclusion was supported by *State v. Garcia-Salgado*. RP 25-26. The appellate court conducts a de novo

review of conclusions of law in an order pertaining to a suppression motion. *State v. Shaver*, 116 Wn. App. 375, 380, 65 P.3d 688 (2003).

The court order issued in this case was in writing, issued by competent authority (a Superior Court judge), in pursuance of law (preserving evidence and seizing the proceeds from crime), directing the doing of an act (freezing the account), addressed to a person competent to do the act (the credit union manager), and affording him protection from damages for doing the act. The court order also meets the constitutional requirements of being issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the thing to be seized. Because the order satisfies these elements it is a warrant.

In *Garcia-Salgado* the State used DNA evidence obtained by court order pursuant to CrR 4.7(b)(2)(vi) to convict the defendant of Rape of a Child in the First Degree. *State v. Garcia-Saldado*, 170 Wn.2d 176, 181, 240 P.3d 153 (2010). The court found that under the Fourth Amendment of the U.S. Constitution and Article I, Section 7, of the Washington State constitution, obtaining biological samples for DNA testing required a warrant and satisfaction of the *Schmerber*[1] requirements that protect interests of human dignity and

[1] *Schmerber v. California*, 384 U.S. 757, 16 L.Ed.2d 908, 86 S. Ct. 1826 (1966).

privacy when the State seeks permission to intrude into the body. *Garcia-Salgado*, 170 Wn.2d at 183-85. Citing *United States v. Mendez-Jimenez*, 709 F.2d 1300, 1302 (9th Cir. 1983), the Washington State Supreme Court declared, "A court order may function as a warrant as long as it meets constitutional requirements." The court then analyzed whether or not the subject order met the constitutional requirements of being issued by a neutral and detached magistrate, particularly describing the place to be searched and the items to be seized, and being supported by probable cause based upon oath or affirmation. *Garcia-Salgado* at 186.

Citing no additional authority and no language within the decision, Meza claims that the ruling in *Garcia-Salgado* is limited to the context of a motion pursuant to CrR 4.7. He points to the fact that CrR 4.7 is subject to an adversarial omnibus hearing. But the case law imposes no such requirement. The Supreme Court in *Garcia-Salgado* cited the Ninth Circuit's decision in *United States v. Mendez-Jimenez*, 709 F.2d 1300, 1302 (1983) to support its ruling. In *Mendez-Jimenez* the Ninth Circuit Court of Appeals upheld an ex-parte court order to compel an x-ray of the defendant's body to determine whether or not he was smuggling drugs. The *Mendez-*

Jimenez court relied upon *United States v. Erwin*, 625 F.2d 838, 840 (9th Cir.1980). In *Mendez-Jimenez* the court states, "A court order compelling a person to submit to an x-ray examination is the equivalent of a search warrant for a body cavity search." *Menendez-Jimenez* at 1302. The *Erwin* court dealt with the constitutionality of the ex-parte court order and concluded that no adversarial hearing was required because the court order was the functional equivalent of a warrant. *Erwin* at 840.

Similarly in this case the trial court's order freezing the funds is the functional equivalent of a warrant; and similarly in this case the trial court was addressing an issue where evidence was rapidly disappearing. In such instances, as in *Erwin*, seizure is necessitated by the circumstances and planning for an adversarial hearing is impractical. Meza has recourse to note the issue for a hearing and to sue if he believes his rights have been violated. Once the money is gone, the State has no recourse; and continual use of the account to launder the money is a crime.

2. Non-Compliance With Ministerial Requirements Of CrR 2.3 Is Not Reversible Error Unless The Defendant Is Prejudiced By The Error.

Meza claims the order freezing his credit union account is not a warrant because the order did not cite to CrR 2.3 and did not:

comply with some of the CrR 2.3 requirements. CrR 2.3 sets out the requirements for a search warrant. CrR 2.3 works in conjunction with RCW 10.79.035 which states:

> (1) Any magistrate . . . when satisfied that there is probable cause, may upon application supported by oath or affirmation, issue a search warrant to search for and seize any: (a) Evidence of a crime; (b) contraband, the fruits of crime, or things otherwise criminally possessed; [and] (c) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.
> (2) . . .
> (3) If the magistrate finds that probable cause for the issuance of a warrant exists, the magistrate must issue a warrant . . . identifying the property . . . and naming or describing the person, place, or thing to be searched.
> (4) The evidence in support of the finding of probable cause . . . shall be preserved and shall be filed with the issuing court as required by ...CrR 2.3.

While RCW 10.79.035 sets out the basic constitutional requirements for a warrant, CrR 2.3 adds numerous procedural requirements such as the ones Meza cites.

The rules for the execution and return of a valid search warrant are ministerial in nature. *State v. Parker*, 28 Wn. App. 425, 426, 626 P.2d 508 (1981). Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits. *Parker*, 81 Wn. App. at 426. (No error to delegate a search for bank records to bank employees.

State v. Kern, 81 Wn. App. 308, 315, 914 P.2d 114 (1996), *rev. den.*, 130 Wn.2d 1003, 925 P.2d 988 (1996). No error in an untimely search as long as probable cause continues throughout completion of the search. *State v. Grenning*, 142 Wn. App. 518, 532,174 P.3d 706 (2008), *rev. den.* 64 Wn.2d 1026, 196 P.3d 137 (2008). No error when return of service not filed. *State v. Temple*, 170 Wn. App. 156, 285 P.3d 149 (2012). No error when there are cumulative procedural errors absent prejudice. *Temple*, 170 Wn. App. at 162-63.) In this case, Meza has not claimed any prejudice arising from the State's non-compliance with the ministerial procedural rules he cites. Neither has he cited any authority for his claim that ministerial procedural rules define a warrant.

CrR 2.3 does not require that the warrant cite to the court rule. CrR 2.3. Meza cannot point to any authority for his claim that citation to the rule is required, and he makes no argument that the failure to cite to the rule has prejudiced him in any way.

B. THE COURT ORDER FREEZING THE CREDIT UNION ACCOUNT PROPERLY SEIZED THE ACCOUNT AS EVIDENCE, THE FRUITS OF CRIME, AND THINGS OTHERWISE CRIMINALLY POSSESSED.

The trial court has authority to order a search for and seizure of: evidence of a crime; the fruits of crime; things otherwise criminally possessed; and things by means of which a crime has been

committed or reasonably appears about to be committed. CrR 2.3. The trial court specifically concluded in its oral findings of fact that the money in the account was evidence and fruits of crime. RP 26.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. The money in the defendant's account is evidence of his crime in that it has a tendency to make the existence of the fact that the defendant was receiving payment from two different people for the sale of a single asphalt plant and was using the account to convert his criminal proceeds to cash. The fact that this evidence and more can also be found in the credit union records does not negate the fact that the electronic fund transactions (EFTs) themselves are also evidence.

Fruits of crime means the results of a criminal act. It is the material objects acquired in consequence of commission of a crime. *USLegal.com*, http://www.definitions.usleagl.com/f/fruits-of-crime/, (last visited Jun. 15, 2015). The money inside the account is also fruits of crime, and things criminally possessed because the EFTs were acquired as a consequence of the defendant's thefts. As such, the money in the account is the legitimate target of the court order.

Finally, although not mentioned by the trial court, the credit union account is an instrumentality of the crime (a thing by means of which a crime has been committed or reasonably appears about to be committed.) Freezing the account prevented Meza from continuing to use the account to launder and dissipate the evidence and fruits of his criminal activity.

Meza argues because the money was in the form of electronic EFTs it is not evidence but mere fungible electronic credits in Meza's name. In *United States v. Daccarett* the State froze certain accounts and later converted them into cash seizures. *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993). Defendants argued the ETFs were not subject to seizure because they were "merely electronic communications" and not property. In rejecting this argument the court found that what was transferred were bank credits, and bank credits are property that can be subject to seizure. *Daccarett* 6 F.3d at 54. Similarly, the ETFs in this case are credit union credits that can be seized as evidence and fruits of crime. There is no requirement under ER 401 and Meza cites no authority for his claim that evidence must be capable of being physically brought into a courthouse before they can be seized.

C. BECAUSE THE ISSUE SPECIFIED FOR APPEAL IS WHETHER OR NOT *GARCIA-SALGADO* AUTHORIZED THE FREEZE ORDER, THE STATE'S BRIEF IS LIMITED TO THAT ISSUE.

RAP 2.4 governs the scope of review of a trial court decision. It states in relevant part:

> The appellate court will, at the instance of the appellant, review the decision or parts of the decision . . . subject to RAP 2.3(e) in the notice for discretionary review.

RAP 2.3(e) states:

> Upon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted.

The appellate court ruling granting review states:

> The trial court committed probable error in ruling that *Garcia-Salgado* authorized the freeze order as to Meza's credit union account. In light of this conclusion of probable error, this court declines to address Meza's argument that the criminal forfeiture statute, RCW 10.105.010, is the exclusive means by which the proceeds of a bank account can be seized by the State.

Because the issue for review is specifically limited to whether or not the trial court committed error in ruling that *Garcia-Salgado* authorized the freeze order as to Meza's credit union account, the State has limited its brief to that subject. In an abundance of caution, however, the State does address the issues of probable cause and particularity below. But, given the specific language that the forfeiture issue is not before the court, the State has not briefed that issue.

Should the court desire briefing on Meza's additional issues, we are prepared to do so.

D. THE COURT ODER FREEZING THE CREDIT UNION ACCOUNTY IS SUPPORTED BY PROBABLE CAUSE AND DESCRIBES THE PROPERTY TO BE SEIZED WITH PARTICULARITY.

Meza argues the order freezing funds should be vacated because the supporting affidavit does not establish probable cause, and the description of the item to be seized does not meet the particularity requirement. The State contends there is probable cause and particularity, and that most of Meza's arguments are not properly preserved for appeal.

1. The Affidavit Determining Probable Cause Is Supported By Probable Cause.

Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that the evidence of the crime can be found at the place to be searched. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Accordingly, probable cause requires a nexus between criminal activity and the item to be seized. *Vickers*, 148 Wn.2d at 108. A magistrate exercises judicial discretion in determining whether to issue a warrant. That decision is reviewed for

abuse of discretion. *Id.* at 108. Appellate courts accord great deference to the magistrate and views the supporting affidavit in the light of common sense. *Id.* at 108. Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant. *Id.*at 109.

In this case, the affidavit supporting probable cause establishes that Meza was selling one asphalt plant to two different buyers during the same period of time. CP 6-13. Most of the purchase money passed through the specified credit union account that was frozen by the court order. CP 11. Some of that money came from Mr. Armstrong and some from Mr. Mansfield. CP 11. Additionally, the affidavit establishes that Meza was systematically draining the account of this money using multiple withdrawals of under $10,000 each. CP 11. These withdrawals appear to be structured to avoid the federal reporting requirements.

Meza complains that the affidavit lacks probable cause because it failed to disclose unrelated deposits from Meza's other customers, and the affidavit did not identify the amount or source of any of the money in the account at the time the order was issued. Material omissions that negate probable cause must be deliberately false, or the result of reckless disregard for the truth. *State v.*

Chenoweth, 160 Wn.2d 454, 478-79, 158 P.3d 595 (2007). To establish a deliberate or reckless material omission Meza must make a preliminary showing; and at an evidentiary hearing he must establish the allegation by a preponderance of the evidence. Even then, once the omitted evidence is included, a determination is made as to whether or not the affidavit establishes probable cause. That has not happened in this case, even though, after finding the warrant valid, the trial court invited Meza to continue to file any and all legal challenges he had to the court order. RP 26.

Meza claims that the order freezing funds interfered with his ongoing business transactions. Yet during the relevant 8-month time period there was only one other minor account transaction unrelated to this case. This fact is not before the court because the defendant did not follow the proper procedure to challenge the order for material omissions. Because Meza did not properly preserve this issue for appeal this court should consider it waived.

Meza also claims a lack of probable cause because the only thing the affidavit shows is that at one point in time the account held a security deposit of $15,000 from Mr. Armstrong, and there was no evidence that the $15,000 was still in the account when the order was signed. It is only the probability of criminal activity, not the prima

facie showing of probable cause that governs the finding of probable cause. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). In determining probable cause, the magistrate makes a practical, common sense decision, taking into account all the circumstances set forth in the affidavit and drawing common sense inferences. *Maddox*, 152 Wn.2d at 509.

The affidavit establishes that $120,000 in cash for the purchase of the plant entered into the account before it was seized, and that $89,000 in cash was withdrawn. CP 11. It is logical to infer that $31,000 was still left in the account. At the time of the order ultimate ownership of the plant was in question, the plant was still located at Alderbrook Quarry, and the evidence indicated that this money would soon disappear, perhaps to Mexico. CP 6-13. Applying common sense to the circumstances leads to the conclusion that the money left in the account was the illegal proceeds obtained from the buyers. It was not an abuse of discretion for the court to find that it was more probable than not that this money was located in the account and was evidence of theft and fruit of the crime.

2. The Property Was Sufficiently Identified.

General warrants are prohibited by the Fourth Amendment. *State v. Stenson*, 132 Wn.2d 668, 691, 940 P.2d 1239 (1997), *cert.*

den. 523 U.S. 1008, 118 S. Ct. 1193, 140 L.Ed.2d 323 (1988). Whether or not the particularity requirement of the Fourth Amendment is met is reviewed de novo. *Stenson*, 132 Wn.2d at 691. To comply with this requirement the search warrant must be sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty. *Id.* at 692. This is tested and interpreted in a common sense, practical manner, rather than in a hyper-technical sense. *Id.* at 692. The degree of specificity varies according the circumstances and the type of items involved. *Id.* at 692. A description is valid if it is as specific as the circumstances and the nature of the activity, or crime, under investigation permits. *Id.* at 692. Here the court ordered seizure of "all funds in account number 16632800" under the name "Raphael Guttierez Meza" located at the "Twin Star Credit Union, 1320 South Gold Street, Centralia, WA." CP 15. This description does not violate the particularity clause because it allowed the credit union management to identify with particularity what should be frozen.

Meza appears to be claiming that the order was overbroad because it included "all funds" in the account. A warrant can be overbroad either because it fails to describe with particularity items for which probable cause exist, or because it describes, particularly

or otherwise, items for which probable cause does not exist. *State v. Higgs*, 177 Wn. App. 414, 311 P.3d 1266 (2013). A warrant may be found overbroad if some portions are supported by probable cause and other portions are not. Review for probable cause and particularity is de novo giving deference to the magistrate's determination.

In this case, the trial court has not ruled on this motion because Meza has not brought the motion. Because this was not heard below, this court does not have a ruling to review.

IV. CONCLUSION

Meza can point to no legal support for his argument that a court order meeting constitutional requirements is not a warrant. He also fails to cite any authority for his argument that noncompliance with the ministerial requirements of CrR 2.3, requires vacating the order. The trial court did not err in denying the defendant's motion to

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unfreeze the funds. This Court should affirm the court's order and return the case to the trial court for trial.

RESPECTFULLY submitted this 15th day of July, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RAFAEL GUTTIEREZ MEZA, Appellant.	No. 47315-1-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sheila E. Weirth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 16, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Timothy K. Ford, attorney for appellant, at the following email addresses: TimF@mhb.com, LindaT@mhb.com, TiffanyC@mhb.com and WindyW@mhb.com.

DATED this 16th day of July, 2015, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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